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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JOHN WELLS et al., Plaintiffs and Appellants, v. ROCKWELL AUTOMATION, INC., Defendant and Respondent.	A106159 (San Francisco County Super. Ct. No. 316792)

I. INTRODUCTION

This is an appeal from a judgment, and more specifically from the cost portion of that judgment, which included a little over $66,000 by way of expert witness fees. Appellants, a husband and wife suing for asbestos-related injuries, protest that these costs were inappropriately assessed because respondent's settlement offer filed pursuant to Code of Civil Procedure section 998 (section 998), an offer to settle for a waiver of costs and to which appellants never responded, was simply a "rhetorical flourish." We disagree and hence affirm.

II. FACTUAL AND PROCEDURAL BACKGROUND

In November 2000, appellants John Wells and his wife filed suit for, respectively, personal injury and loss of consortium caused by asbestos-related disease against a large number of defendants. The complaint alleged that Wells had been exposed to asbestos during his employment by the U.S. Navy and, thereafter, at refineries where he worked as a pipefitter. On April 4, 2002, via an amendment to the complaint, three other defendants, including the Allen-Bradley Company, were added.

On May 10, 2002, respondent, as "successor by merger to Allen-Bradley Company, LLC," filed its answer denying liability. Twelve days later, on May 22, 2002, appellants served a section 998 settlement offer upon several named defendants, including respondent. By this filing, appellants offered to settle with respondent for $34,999 for Wells and $17,499 for his wife. At that point in time, the evidence relating to Wells' exposure to various asbestos products was mainly, if not entirely, based on his three-day deposition in March 2002, during which time neither Allen-Bradley nor respondent were identified by him as a producer of products to which he had been exposed.

On June 5, 2002, while appellants' section 998 offer was still viable under the terms of that section, respondent objected to it on the ground that there was no evidence in the record thus far that Wells had ever been "exposed to any asbestos-containing product that was manufactured or supplied by Allen-Bradley or to any product for which Rockwell Automation may be held liable . . . ." Because of that, respondent protested, there was no basis in the record upon which it could be held liable to appellants. In a second paragraph of the same document, however, respondent counter-offered, also pursuant to section 998, to settle for a waiver of its costs incurred to date in exchange for a voluntary dismissal of appellants' action against it.

Appellants never responded to respondent's counter-offer which, of course, expired by operation of law 30 days later. (See § 998, subd. (b)(2).)

Jury selection began on February 20, 2003, and trial began on February 27, 2003. After an extended jury trial, the jury returned a verdict in favor of respondent on April 15, 2003. On April 30, 2003, the trial court entered judgment in favor of respondent; it awarded respondent "statutorily allowed costs" but left blank the amount of such costs.

On May 15, 2003, respondent filed a cost bill seeking costs totaling $77,774.61, of which $66,094.49 consisted of expert witness fees. In response, on June 2, 2003, appellants served a motion to tax costs. In it, they did not challenge the validity of respondent's section 998 counteroffer but, rather, argued that the expert witness fees

being claimed were substantially inflated and not sufficiently documented or otherwise substantiated.

On June 10, 2003, respondent filed its opposition to that motion; it included invoices allegedly supporting the challenged expert fees and a similar declaration from one of its counsel. Appellants did not file a reply to this opposition.

On June 20, 2003, the first of a series of four hearings was held on appellants' motion to tax costs. The principal argument made by appellants' counsel at this hearing was, again, that certain of the expert witness charges were not reasonable.[1] The hearing concluded by the trial court requesting respondent to file an amended cost bill and then ordering the hearing continued. In so doing, however, the court indicated that it was inclined to award respondent some of its expert witness fees.

On July 7, 2003, respondent filed an amended memorandum of costs in compliance with the court's June 20 request. On August 15, 2003, appellants filed a response to this amended memorandum and, in it, again challenged respondent's "greatly overblown 'costs.'" It contended that respondent was entitled to "no more than $24,260.11 in expert witness costs."

On August 19, 2003, respondent filed an objection to appellants' response; it argued only that appellants' August 15 opposition was untimely.

The continued hearing on appellants' motion to tax costs was held on August 22, 2003. Again, argument centered on the reasonableness of certain specific expert witness charges listed in the amended cost bill, but not the validity of the cost bill itself or respondent's original section 998 counteroffer. The hearing was then continued until September 26, 2003.

At that continued hearing, the trial court indicated that it thought the expert witness fees claimed by respondent were generally reasonable with one exception (relating to some $6,000 of fees claimed by a Dr. Goodman). It asked respondent to file

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[1] As appellants stress in their briefs, an additional argument was briefly mentioned by appellants' counsel at this first hearing; we will discuss this argument *ante.*

yet another cost bill reducing those fees and redacting from the attached invoices any cost items that were not also included in the cost bill. The hearing was again continued.

Respondent complied with the court's requests by an amended cost bill filed on October 22, 2003. In it, the total of expert witness fees claimed was $62,881.99.

The continued (and fourth) hearing on the challenged costs took place on November 7, 2003. That same day, appellants electronically filed a response to respondent's most recent version of its cost bill, claiming, for the first time, that respondent's June 5, 2002, objection to their section 998 offer operated "as a waiver of [respondent's] own ability to move for costs after a verdict." Nothing, however, was said about the amount or reasonableness of the section 998 counteroffer proffered that day by respondent, i.e., a waiver of costs. The court, although concerned by the belatedness of this argument from appellants, nonetheless heard argument on both the new issue raised by appellants and other issues as well. It ultimately ruled that respondent's section 998 offer was, indeed, valid.

On January 23, 2004, the trial court issued its written order finding that appellants' remaining objections to respondent's cost bill were without merit, that respondent's section 998 offer was valid and, specifically, that the expert witness fees sought by respondent both "properly recoverable" under that section and "reasonable in amount." An amended judgment including the allowed costs was filed the same day. Notice of entry of that judgment was served on February 4, 2004, and filed on February 6, 2004. Appellants filed a timely notice of appeal on March 26, 2004.

III. DISCUSSION

As noted in our Introduction to this opinion, appellants' basic position is that the expert witness fees assessed against them by the trial court were inappropriate because respondent's June 5, 2002, "counteroffer to compromise pursuant to C.C.P. § 998" to "waive its right to costs under C.C.P. § 1032 in exchange for plaintiffs' voluntary dismissal of their action against it, as permitted by C.C.P. § 998" was invalid. More specifically, appellants argue, it was invalid because the offer was "not within the range of acceptable offers," "not a good faith offer," but only "a token gesture." This argument

fails for three separate and distinct reasons: (1) it was never made to the trial court and hence was waived; (2) it is directly contrary to an explicit and recent opinion from this court; and (3) it disregards the substantial discretion given to a trial court, particularly one before which the case was tried, to determine the reasonableness of a section 998 settlement offer. We will discuss these points in that order.

Appellants filed three separate memoranda of points and authorities in support of their motion to tax costs, namely those of June 2, August 15, and November 7, 2003. Their counsel personally participated in four hearings on this motion,[2] hearings which, on the cost bill issue, consume over 100 pages of reporter's transcripts. From our review of that record, it is clear that 95% of the argument presented by appellants' counsel dealt with the *amount and reasonableness* of the claimed expert witness fees. Thus, in their first two memoranda of points and authorities in support of their motion to tax costs, appellants contested the reasonableness of the expert witness fees for nine (9) experts listed in respondent's cost bill. The first such memoranda, i.e., that filed June 2, 2003, started out by challenging the amount ($18,390) being claimed for a Dr. Goodman (contending that the "amount of this claim is patently ridiculous") and then doing the same, albeit in briefer fashion, regarding the eight other listed expert witnesses. It ended by urging that no more than $22,640 was reasonable for all of respondent's expert witness fees.

Appellants' second, August 15, 2003, filing was essentially the same memorandum, with only a few changes in wording and dollar figures. It also concentrated most of its fire on the fees claimed for Dr. Goodman, but again urged reductions for the other eight experts; it concluded by urging that respondent's expert witness fees "can reasonably be no more than $24,260.11."

The first three of the four hearings before the trial court involved the same issue, i.e., the reasonableness of the *amount* of the claimed fees. Thus, in the first, June 20, 2003, hearing, appellants' counsel concentrated on the excessive (in his view) travel time

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[2] Appellants' counsel participated via telephone in the last, November 7, hearing.

shown for several of respondent's experts and the improper inclusion of food and hotel costs for them. Almost exactly the same points were argued extensively at the next two hearings, i.e., those of August 22 and September 26, 2003. In those hearings, counsel argued back and forth in great detail about the amount of time it was appropriate to charge for the travel of some of the experts, the length of time some of them spent in San Francisco before actually testifying and whether charges for this time were appropriate, whether more than one trip to San Francisco by several of the experts was justifiable, etc. As a result of this extended debate, some compromises were reached. Thus, at the September 26 hearing, counsel conferred off the record—after being urged to do so by the court—after which respondent's counsel agreed to accept some $6000 less for the fees and expenses of Dr. Goodman.

From all of this, it is clear that, as noted above, the overwhelming concentration of appellants' challenge to respondent's cost bill, at least pre-November 2003, was on the reasonableness of the amounts claimed.[3]

Appellants identify two points at which, they contend, they raised in the trial court the validity issue they now raise to us. The first of these is a passage in appellants' counsel's first oral argument in the trial court in support of the motion to tax costs. There, after arguing extensively regarding the "unreasonable" amount of the expert fees being claimed, appellants' counsel concluded:

"So, your honor, we would urge the court to review their submissions in view of the case law. Technically, the case law that talks about 998 costs and what are recoverable and not recoverable. We have been in the position where we have been a prevailing party. And because the court held that our pretrial offer to compromise was not reasonably likely to be accepted, we have been denied thousands of dollars of 998

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[3] The trial court saw matters exactly this way, too. At the hearing on November 7, when appellant raised (albeit quite differently, as pointed out below) an issue regarding the validity of respondent's section 998 offer, it asked appellants' counsel: "Why wasn't this raised before," noting that "all of the arguments prior till now was [sic] based on the reasonableness of the costs . . . ."

recoverable costs, despite our beating our 998 offer to compromise with a trial verdict. That same consideration is appropriate here. [¶] Mr. Wells is a man with a serious disease, which, there is testimony that indicates, is the product of the total dose of carcinogens that he receives in his lifetime given sufficient latency. I believe that the 998 offer in this case from Allen-Bradley was exceedingly modest and we challenge its reasonableness in the same way that offers to compromise are scrutinized that the plaintiffs make pretrial. And if the court is inclined to conclude that the offer was not reasonably likely to lead to a resolution of the case pretrial, then the court would -- the court within its discretion can deny all 998 expert costs."

The second time, according to appellants, that the issue of the basic validity of respondent's counteroffer was raised was in their two-page memorandum e-filed with the court just before its November 7, 2003, final hearing. The entire argument of appellants in that memorandum was as follows:

"The defendants in this case seek expert witness costs under C.C.P. § 998. Unfortunately for them however they have already objected [o]n June 3, 2002, to the plaintiff's C.C.P. § 998 offers ([s]ee attached declaration of Anthony E. Vieira). The defense cannot possibly suggest that this objection operates as anything other than a waiver of their own ability to move for costs after a verdict. Implicit within the objection is that, had the plaintiffs prevailed, then Rockwell, would have by virtue of its objection have taken the position that the plaintiffs were not entitled to rely on the C.C.P. § 998's in requesting expert witness costs from Rockwell thereby effectively using them as a shield. To allow them to now turn around and claim that they are entitled to use them as a sword is extraordinarily unfair, inequitable, and violative of fundamental notions of due process."

Appellants contend that these two passages, one verbal, one written, establish that they did not waive the argument they are now making to us. We respectfully disagree for the reason that the arguments quoted above are not the same as that presented here. The first, the excerpt from the argument of appellants' counsel on June 20, 2003, is simply an appeal to the trial court to exercise its "discretion" to deny the respondent "all 998 expert

costs" on the ground that the "exceedingly modest" section 998 offer from respondent "was not reasonably likely to be accepted." Such is not the argument here. Rather, in their briefs to us, appellants repeatedly assert that respondent's counteroffer was "not a valid offer" under section 998 because, among other things, it was not made in "good faith."

Further, the abbreviated written argument filed with the court the morning of the final hearing on the costs issue is, also, not the same as what is being asserted here. Although the point is admittedly murky—due to the obviously hasty nature of appellants' November 7 filing—what appellants' counsel appeared to be arguing both in their one-paragraph filing and over the phone to the court, was that the only section 998 offer "on the table" as of June 2002 was appellants' and that, once this was rejected by respondent on June 5, 2002, that rejection effectively expunged any and all section 998 considerations. Put another way, appellants' position seemed to be that, because respondent's rejection of *their* section 998 offer made it impossible for them to have recovered expert witness fees if they had won at trial, "due process" required that respondent be placed in the same boat.

But, as respondent's counsel pointed out to the trial court, this argument ignored the fact that its filing of June 5, 2002, specifically contained a counteroffer under section 998. More significantly for present purposes, the argument made in appellants' November 7 filing and oral argument was not that respondent's section 998 counteroffer was invalid because unreasonably low—the argument being presented to us on this appeal—but, rather, that it was invalid because of respondent's rejection of *appellants'* section 998 offer.

On these bases, we hold that appellants have waived the argument they are now urging to this court regarding the invalidity of respondent's counteroffer. But even if appellants had preserved that issue, a prior decision of this court, indeed of this panel, makes clear that their argument is simply incorrect. In *Jones v. Dumrichob* (1998) 63 Cal.App.4th 1258, 1262-1266 (*Jones*), this court affirmed a judgment of the Lake County Superior Court awarding a defendant-doctor in a tort action expert witness fee costs

incurred after the plaintiffs had rejected a section 998 settlement offer by the defendant-doctor for judgment to be taken against him "for a waiver of costs." In that case, as here, appellants argued that the respondent's "section 998 offer to compromise was not a reasonable offer, but rather a token, tactical one made only to preserve the right to later claim these disputed costs." (*Id.* at p. 1262.)

We rejected that claim. In so doing, we first discussed and distinguished two cases relied upon by both appellants here and the appellants in *Jones*, *Wear v. Calderon* (1981) 121 Cal.App.3d 818 (*Wear*) and *Pineda v. Los Angeles Turf Club, Inc.* (1980) 112 Cal.App.3d 53 (*Pineda*). As to those cases, we said: "Appellants' reliance on *Wear* and *Pineda* is misplaced since both are factually distinguishable. In *Wear*, the record supported a conclusion that the $1 offer was made solely to enable defendant to recover expert expenses, and not because it was realistically related to its potential liability. Plaintiff in *Wear* recovered $18,500 against other defendants, indicating his claim manifestly had merit. [Citation.] In *Pineda*, the court determined that the exposure to defendant was "enormous" despite liability being 'tenuous.' [Citation.] Unlike the record in these cases, appellants offer nothing more than the blithe assertion that the cases are analogous, stating that respondent made a similarly 'unrealistic and unreasonable' offer solely in order to 'gain a strategic advantage.' Appellants can point to nothing in the record to support their contention factually. [¶] Also, unlike *Wear* and *Pineda*, respondent's offer demonstrably did have significant monetary value. Appellants overlook the fact that in offering to have judgment entered against him, respondent was also waiving his considerable cost bill against which appellants' likelihood of success in the case must have been weighed. No such conditional offer was made in either *Wear* or *Pineda.*" (*Jones, supra,* 63 Cal.App.4th at p. 1263.)

We then went on to reject essentially the same argument being made by the appellants in this appeal: "Moreover, appellants have failed to establish that the absence of a net monetary sum as part of a pretrial statutory settlement offer constitutes a per se violation of the good faith requirement. To the contrary, case law interpreting the good faith requirement allows for great flexibility in customizing pretrial settlement offers.

Expounding on the latitude allowed parties in formulating settlement offers, the court in *Goodstein v. Bank of San Pedro* (1994) 27 Cal.App.4th 899, 906, noted: '[T]he statute does not indicate any intent to limit the terms of the compromise settlement or the type of final disposition.' Another court concluded that even a 'modest settlement offer' may be in good faith if it is believed the defendant has a significant likelihood of prevailing at trial. [Citation.] These two cases clarify that section 998 does not confine an offeror to strict content-based rules, but rather imposes only the flexible parameters of the good faith requirement on the formulation of a section 998 offer. [¶] We find no abuse here in the trial court's making a discretionary award of expert witness fees. Facially, respondent's offer carried a significant value to appellants because, if accepted, it would have eliminated appellants' exposure to the very costs which are the subject of this appeal, a sum appellants can hardly claim now to be de minimis. We are not obliged to ignore the reality that respondent prevailed at trial. In fact, the trial result itself constitutes prima facie evidence that the offer was reasonable, and the burden of proving an abuse of discretion is on appellants, as offerees, to prove otherwise. [Citation.]" (*Jones, supra,* 63 Cal.App.4th at p. 1264.)

Our decision in *Jones* is clearly controlling here. The facts are almost precisely the same: a pretrial section 998 offer by a single defendant to settle for a waiver by him (or it) of costs, a rejection of that offer (there explicitly, here by operation of the statute), a trial victory for the defendant, the filing by him (or it) of a cost bill including expert witness fees, and an attack upon that portion of the cost bill via a motion to tax costs, a motion premised on the contention that the pre-trial section 998 offer "was not a reasonable offer, but rather a token, tactical one . . . ." (*Jones, supra,* 63 Cal.App.4th at p. 1262.) There are, in short, absolutely no tangible differences between the facts of *Jones* and those before us. We easily opt to adhere to our holding in that case.[4]

[4] Also choosing to follow *Jones* was a panel of the Fourth District, Division One, in *Carver v. Chevron U. S. A., Inc.* (2002) 97 Cal.App.4th 132, 152-154.

Finally, and as *Jones* also notes several times (and, indeed, appellants concede here), our standard of review is abuse of discretion. We specifically applied that standard in *Jones*, stating as follows: "Considering that the determination of the good faith and reasonableness of a section 998 compromise offer is left to the sound discretion of the trial court [citation], appellants' failure to designate the reporter's transcript of the trial as part of the record on appeal leaves this court with no evidence upon which to base a finding that the trial court abused its discretion in determining that respondent's section 998 offer was reasonable. Given this omission, and unlike the trial judge, we are unable to evaluate independently the strength of appellants' case on the merits. Therefore, on this record, it would be speculative to make that assessment ourselves, or to reject the trial court's judgment. [Citation.]" (*Jones, supra,* 63 Cal.App.4th at p. 1264.)

Similarly, here we are in no position to evaluate the extent of respondent's exposure or even the closeness of the case at trial. As in *Jones*, appellants have not offered anything in the record from the trial itself. By contrast, the experienced trial judge who presided over that trial *and* considered appellants' attack on respondent's expert witness fee claim had an intimate acquaintance with that subject. He determined, after four separate hearings on the subject, both that respondent's June 2002 section 998 counteroffer was reasonable under the circumstances known then and that the fees ultimately allowed were likewise reasonable. We are in no position to find either determination an abuse of discretion.

V. DISPOSITION

The judgment is affirmed.

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Haerle, Acting P.J.

We concur:

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Lambden, J.

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Ruvolo, J.